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HEADQUARTERS EIGHTH ARMY
United States Army
Office of the Staff Judge Advocate.

Yokohama, Japan
19 February 1948

UNITED STATES OF AMERICA VS HAJIME HONDA

Review of the Staff Judge Advocate

1. The attached record of trial of Hajime Honda at Yokohama, Japan, from 12 May to 14 May 1947 by a Military Commission appointed by paragraph 19, Special Orders No. 108, Headquarters Eighth Army, dated 9 May 1947, having been referred to the Staff Judge Advocate, this review thereof is submitted to the Commanding General.

Personal Data Concerning Accused

NAME: Hajime Honda
AGE: 31
RESIDENCE: Kumamoto Prefecture,
Kamimashiki-gun, Hiroyasu-mura,
Manizu No. 618
MARITAL STATUS: Married
RELATIVES: Wife, father, mother,
five brothers and sisters
EDUCATION: Primary school
VOCATION: Storekeeper
MILITARY CAREER: Imperial Japanese
Army from 10 January 1938 to
7 May 1942.

DATE OF CONFINEMENT: 9 April 1946
DATE OF ARRAIGNMENT: 12 May 1947
PLACE OF TRIAL: Yokohama, Japan
PERIOD OF TRIAL: 12 to 14 May 1947
DATE OF SENTENCE: 14 May 1947
SENTENCE: Death
CLEMENCY RECOMMENDED BY
COMMISSION: No

2. Synopsis of Charges, Pleas, Findings, Legal Sufficiency and Sentence:

<u>Charge and Specifications:</u>	<u>Pleas</u>	<u>Findings</u>	<u>Legally Sustained</u>
Charge: Accused, a civilian employed by and serving with the Imperial Japanese Army, at the times and places set forth in the specifications hereto attached, did violate the Laws and Customs of War.	NG	G	Yes
Sp 1: In or about January 1945, accused did willfully and unlawfully mistreat William Ivarson and Roy Heath, American PW's; by beating and otherwise abusing them, thereby contributing to the death of William Ivarson.	NG	G	Yes, in part
Sp 2: In or about December 1944 or January 1945, accused did willfully and unlawfully mistreat C. J. Cherns, James Ackerman and other unidentified American PW's and an unidentified Dutch PW by beating and otherwise abusing them, thereby contributing to the death of said Dutch PW.	NG	G	Yes, in part

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Charge and Specifications:

Pleas

Findings

Legally Sustained

Sp 3: On or about 10 August 1944, accused did willfully and unlawfully mistreat George W. Dowling, an American PW, by beating him into unconsciousness with a gun and fists and otherwise abusing him.

NG

G

Yes

Sp 4: On or about 20 August 1944, accused did willfully and unlawfully mistreat Homer Henry Condit, an American PW, and numerous other American and Allied PW's by beating and otherwise abusing them.

NG

G

Yes

Sp 5: In or about September 1943, accused did willfully and unlawfully mistreat James Leonard Monk, a British PW, by beating and otherwise abusing him.

NG

G

Yes

Sp 6: Between 1 May 1943 and 30 June 1945, accused did willfully and unlawfully mistreat numerous American and Allied PW's by beating and otherwise abusing them, thereby contributing to the death of many of them.

NG

Guilty, except the words "thereby contributing to the death of many of them"; of the excepted words, not guilty.

Yes

(as modified)

Sentence imposed: Death

Maximum legal punishment: Death

3. Summary of the Evidence:

a. For the Prosecution:

As to Specification 1: PW Novill stated that just before Christmas 1944 between 6:00 and 6:30 in the evening, Iverson and Heath, American PW's, were sitting on a bunk in the barracks smoking. They did not see the accused come in and were slow in saluting and bowing. The accused became enraged and hit and slugged Iverson and then Heath, knocking them down across their beds. He then jabbed Iverson across the small of his back with the butt of his rifle. He then told Iverson and Heath to follow him outside. Iverson had on only a shirt and pants cut off above the knees. The temperature was between 0 and 10 degrees. The accused took them about thirty feet behind the barracks. The witness stated he was standing in back doorway of barracks where he could closely watch the actions of the accused. The accused made them assume the "push up" position. He took a stick about five feet long and whenever Iverson could no longer hold the push up position, he struck him across the back and legs. Each blow across the back made Iverson fall to the ground. In about twenty-five minutes he dismissed Heath, and for the next thirty minutes he continued to beat and kick Iverson. He left Iverson lying on the snow which had turned red from his blood. About an hour and a half elapsed from the time the accused came into the barracks until the time he quit beating Iverson. The witness and one or two others carried Iverson back into the barracks and put him to bed unconscious. His nose was bleeding, his skin was split in several places, and there were blood clots on the back of his legs. The next morning Iverson was conscious but refused to eat anything. That night when witness came in from work he saw Iverson unconscious. He never saw him regain consciousness. He lived about sixty hours and died without leaving his bed (Ex. 2).

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PW Bull described the beating of Ivarson by the accused. He stated that the beating occurred in about February 1945. He stated that Ivarson was not able to walk after the beating and in a few days he contracted pneumonia and died. (It is not clear whether the affiant was testifying from personal knowledge or hearsay). (Ex. 3).

PW Heath stated that he believed it was about 26 January at about 8:00 AM when the accused took him and Ivarson out and ordered them to do "push ups" for several minutes because they had received a cigarette from another PW. He beat each of them severely with a pole for about forty minutes until a new guard came on duty. The accused conferred with the new guard and the latter continued the beating about thirty minutes. Each guard used the same pole. They centered their blows on the small of their backs and the rear of their legs. As a result they received welts the size of their fists. An order to line up for parade terminated the beatings. Another PW helped them to their feet, and with assistance of other PW's they marched in the parade. After the parade Ivarson was confined to his hut, and was not able to do camp duties. Heath visited Ivarson several times after that and saw Ivarson passing blood through his urine. Approximately four days after the beating Heath contracted pneumonia and was unconscious in hospital for almost five days. After regaining consciousness he was informed by PW Bull that Ivarson had died from the beating by the accused and the other guard (Ex. 20).

PW Kostecki, Major, Medical Corps, U. S. Army, Camp Surgeon, stated that Ivarson's physical condition had been fair, other than he showed evidence of starvation and malnutrition. He was called about 2:00 AM one day in February 1945 to give Ivarson medical treatment. He found Ivarson unconscious; his pulse was very rapid and he looked as if he were going to die. By the time he could make arrangements to hospitalize him, Ivarson was dead. At the time he heard from fellow PW's, whom he knew were reliable, that Ivarson had received a serious beating from the accused. From his personal experience and observation (not of this incident), he had no doubt but that the accused had beaten Ivarson (Ex. 4). The death certificate (Ex. 26) and the individual record card (Ex. 27) of Ivarson were introduced in evidence by the prosecution. The death certificate shows Ivarson died on 8 February 1945 from beriberi. The death certificate appears to have been signed by Major Kostecki (Ex. 27). However he stated that he signed the death certificates under duress. Upon the death of an individual, the Japanese made up their own clerical records without any knowledge of the patient's illness, and insisted he sign these records to which death certificate was attached. Since the records were in Japanese script, he could not read them. When ordered to sign them, he did so, practically on threat of death. There were approximately one hundred deaths of PW's while he was in the camp. He examined bodies prior to signing death certificates, but at no time was he permitted to keep his own clerical records or any writing materials. From recollection he knew the main cause of death was malnutrition, and secondary to malnutrition was pneumonia, diarrhea or dysentery, and, in a number of cases, beatings (Ex. 4).

As to Specification 2: PW Cherne, an American PW, testified that about the end of December 1944, during the dinner hour, he, American PW Ackerman, and two others were required to assume the "push up" position and each was beaten by the accused, "who could really swing that club", with a bamboo pole about the legs and back for about forty-five minutes, after which they were permitted to rejoin a group of PW's. He ate his meal of rice, and all went back to work. He kept moving that afternoon so his legs would not be too sore to march the six miles back to camp that night. That night after work all went to the American doctor, Major Kostecki, and showed their bruises. They all stayed in bed the next day; three got out of bed the following day, but the fourth, the PW Dutchman from Java, did not. He was removed to the hospital that night and died within forty-eight hours. In the opinion of the witness the beating the Dutchman had received was directly responsible for his death. (Ex. 10).

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PW Johnson also described the beating. He states the four men beaten by the accused were three Americans and one Dutchman. He beat them with a pole for about three hours. The Dutchman died and the three Americans had to go to the hospital (Ex. 1).

PW Krysan stated he saw the accused beat a Dutchman with a club about February 1945. He died in a few days (Ex. 11, 12).

PW French stated that he saw the accused about the end of December 1944 or early January 1945 bash a Dutchman into unconsciousness. The accused would allow no one near him. When the Dutchman recovered, he bashed him again using butt of rifle. The accused forced the Dutchman to march the ten miles to camp through snow about a foot deep. On arrival at camp, the Dutchman was put in the hospital but died two days later (Ex. 22).

PW Mayo stated sometime in January 1945, the accused and another guard beat two Dutchmen, one Javanese and two American PW's. One of the Americans was Corporal Turner. They beat the men into unconsciousness with bamboo poles for about one and one-half hours (Ex. 24).

As to Specification 3: PW Dowling, an American PW, stated that about 10 August 1944, just because his cap was not on to suit him, the accused beat him over the head with a gun until the blood ran down his face. He then smacked him in the face with his fist and knocked him out (Ex. 14).

As to Specification 4: PW Condit, an American PW, stated that about 20 August 1944 the accused stood out by the latrine and stopped every PW that came along and asked his nationality. The Dutch he allowed to pass; the English he slapped with his fist; the Americans he made stand at attention and beat them with his fists, or a club, or the butt of his rifle. On this occasion he slapped the witness in the face with his hand and struck him on the right side of his chest with the butt of his rifle, knocking him down and fracturing two ribs. He then made him stand at attention for about twenty minutes while he continued to slap and abuse other men. (Three affidavits of affiant Condit, Ex. 17, 18, 21).

As to Specification 5: PW Chalkley stated that about September 1943 during the lunch hour, the accused and another guard shouted for the men to start work. PW Monk, a British PW, shouted they hadn't completed their dinner hour. The two guards ordered Monk to report to them, and they both beat him with their fists about the head and body and threw him over their shoulders in jujitsu fashion. They continued this treatment for about forty-five minutes until they were stopped by the British Regimental Sergeant Major. Monk's face was badly cut and swollen (Ex. 5).

As to Specification 6: PW Kostecki, Major, Medical Corps, U. S. Army, camp surgeon, stated the accused beat him; he also frequently and regularly came into the hospital and gave severe beatings to patients under his care (Ex. 4). PW Chilton, British Army, stated the accused had very strong sadistic tendencies, and he thought he was a little unbalanced. He was fond of beating PW's and would do it under the slightest pretext. He invariably used the butt of his rifle or a bamboo pole for these beatings. The accused beat the witness several times. He knew he had administered several severe beatings to other PW's. He came through the barracks and if PW's did not spring to attention, he used to bang them on the head with the butt of his rifle. The witness saw him do this many times (Ex. 6). PW Newman, British Army, stated the accused beat PW's on slightest provocation. About June 1945 the accused asked the witness to make him a pair of clogs, and on telling him he was not allowed to do so, the accused struck him across his back about six times with a stick. At about the same time while on a working party, the accused made an American PW assume the "push up" position and every time the PW's body sagged, the accused struck him across the back with a bamboo (Ex. 7). PW Rogee, U. S. civilian employee,

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testified the accused beat him with his fists two or three times, usually for some minor infraction as failing to salute or to bow (Ex. 8). PW de Wijn, Medical Officer, Dutch Army, stated there were many beatings by the guards of which the accused was one; he was mentally deranged; he lacked all vestige of control. He maltreated many in the camp, especially with his gun. If someone failed to salute to satisfy, he would ram wildly with it. As far as the witness knew, his acts of maltreatment left no lasting injuries, although those ill treated had to be admitted to the hospital for treatment (Ex. 9). PW Krysan, U. S. civilian employee, stated the accused was very brutal with all PW's. He beat just about everyone in camp (Ex. 12). PW Forsberg, U. S. civilian employee, stated the accused was continually beating the men (Ex. 13). PW Thayer, U. S. civilian employee, stated the accused went through the barracks calling attention. Some men were too sick to get up. He would jerk them up on their feet and beat them to insensibility. This happened on innumerable occasions (Ex. 15). PW Barney, U. S. civilian employee, stated the accused was apparently mentally deranged. He saw him hit innumerable prisoners because they had gone into their huts without removing their hats. On occasions too numerous to mention the accused swung on prisoners without provocation (Ex. 16). PW Condit, a U. S. civilian employee, stated the accused was continuously knocking someone down for not saluting him when he was standing in the dark where he could not be seen. He would stand PW's at attention and slap them or hit them with the butt of his rifle with or without provocation (Ex. 17, 21). PW White, a U. S. civilian employee, stated the accused beat a PW with part of the shovel handle the PW had broken until he was completely unconscious. The accused appeared to be crazy (Ex. 23). PW Mayo, U. S. Army, stated the accused hit a seventy-five year old man over the head with a hammer and knocked him unconscious. He participated in the beating of three Americans, two Dutchmen, and one Englishman because they had stolen some peanut oil (Ex. 24). PW Pitochelli, a U. S. civilian employee, stated at times the accused did not seem to be himself, and during such times he treated the prisoners very badly. At such times he would strike PW's with his hands, fists, club, rifle, or anything he could get his hands on. There were numerous such occasions (Ex. 25). PW Chalkley, British Army, stated that on orders of Sakamoto, the Camp Commandant, PW Marshal was tied to a telegraph pole and beaten for taking Red Cross supplies. He saw the accused and seven or eight other guards beat him with bamboo poles for three hours. He was then put in a cell for about ten days and then brought back to his hut. He was in bad physical condition then, and died a month or two later at another camp, undoubtedly as a result of this brutal treatment (Ex. 5);

b. For the Defense (as to all specifications):

(1) Takeo Katsura testified he was interpreter at the camp. Part of his job was carrying requests from PW officers to the camp commander. Major Kostecky complained once that the accused had beaten someone in the hospital. He never saw the accused strike any PW's. The accused was a very nice man (R. 23 to 25).

(2) Hitoshi Fuchise testified he was a guard at the camp from October 1943 to February 1945 (R. 28, 31); he never saw the accused strike any PW's; later he heard that the accused had beaten some PW's lightly. He did not know of any PW's beaten to death by anyone in the camp; he heard of none that required hospitalization (R. 29). He stated the Japanese considered the rifle was issued by the Emperor, and if a soldier damaged his weapon in the slightest way, he was subject to heavy guardhouse confinement, and because of this the guards were particularly careful in taking care of their rifles and not scuffing them up (R. 30). He did not know if any PW's had died in camp (R. 32). The accused's right shoulder was disabled, but he was able to use a rifle in his right arm (R. 34). He saluted mostly with his left arm (R. 35).

(P. 5, Honda, Case #85)

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(3) Yuhichi Sakamoto testified he was a captain, camp commander from January 1943 to May 1945 (R. 37). Major Kostecki or no other Allied officer every complained to him that the accused had beaten any PW's to death or that he had beaten any PW's so severely as to require hospitalization. The accused was injured in his shoulder and this hindered movements of his arm. About 120 to 130 PW's died while the witness was camp commander. The accused was relieved from camp at his own request. He had not received any complaints concerning the mistreatment of PW's by the accused (R. 38). He had no recollection of the death of Iverson; he did not know the cause of death of PW's (R. 39). Had he ever received information that a PW had been beaten to death, he would have conducted a thorough investigation (R. 40).

(4) Masato Hada testified he was medical orderly at the camp from December 1943 to 30 April 1945, on duty at the hospital. He did not at any time recall that an American PW had been beaten to death. Major Kostecki never complained to him that the accused had beaten a PW to death (R. 41).

(5) Hajime Honda, the accused, having been advised of his rights (R. 2), was sworn and testified in his own behalf. He stated he had been in the Japanese Army from 10 January 1938 until 7 May 1942. He received an injury in battle and had difficulty using his right arm; he saluted with his left hand and carried his rifle on his left shoulder. He arrived at the camp on 23 May 1943, and was a civilian guard for one year and ten months (R. 43). He never beat any PW so severely that he died as a result of the beating. He did not recall PW's Iverson, Heath, Cherne, Ackerman, Dowling, Condit, or Monk. He never struck any PW with the butt of his gun or a club. He admitted hitting five or six PW's with his fist two or three times; none were knocked to the ground; none lost consciousness. He did not think it was wrong to beat PW's, as it was the usual practice in the Japanese Army to beat and reprimand a person. Some PW's requested they be slapped instead of being put in the guardhouse; two PW's whom he caught stealing food requested they be slapped instead, and he slapped them (R. 44-46). Previously he had told investigators he had beaten a PW one time, but while in Sugamo, he recalled several more (R. 49). He beat one for not turning out for callisthenics; one for stealing lunch from some laborers; one for smoking during prohibited hours; and one for having kindling wood in his possession. He denied he ever hit Major Kostecki or any PW in the sick bay (R. 50). The accused demonstrated the lateral movement of his right forearm, swinging from the elbow which he used when he beat prisoners. (R. 51).

4. Errors and Irregularities:

The defense contended that the ruling of the Law Member in regard to objections by the defense to evidence offered by the prosecution was prejudicial to the accused and denied him a fair trial (Defense Motion, p. 16). The ruling made by the Law Member at the outset of the trial (R. 7) was:

"In my opinion, objections avail the defense very little from my experience in preceding trials. All evidence will be evaluated by the Commission for what it is worth. If it is not worth much, it can be pointed out by the defense and a value will be put on it by the Commission. I have seen lots of time wasted at trials by useless objections. I might say along this line that this board of members is going to recommend that objections by the defense be restricted to almost nil for the reason that they don't see how the defense, that is objections by the defense, can help the trial." (Emphasis added)

The Law Member, however, added (R. 7):

"If you have substantial reasons for the objection, all right. If not, don't object because it is just delaying the trial."

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This ruling, though highly improper, did not create an atmosphere in which the defense was confronted with a hopeless situation in safeguarding the rights of the accused. It does not appear from the entire record that the accused was in any way prejudiced by the ruling. In spite of the ruling, the defense continued to interpose objections throughout the trial whenever it deemed proper, and the Commission ruled on the objections based on their merits. Many of these rulings favored the defense (R. 8, 15, 17, 20, 25, 32, 39, 40, 49). Nowhere does it appear that the defense failed to make objection, or was denied opportunity to make objection where the circumstances warranted an objection. The accused received a very fair trial throughout.

5. Opinion:

a. As to the legal sufficiency of the record to support the findings, a discussion of each specification follows:

(1) Specification 1: PW Nevill stated he was an eyewitness to the beating of Iverson and Heath. He does not mention anyone except the accused doing the beating. He stated the accused beat the two PW's for about twenty-five minutes and then dismissed Heath and continued beating Iverson for about half an hour. The accused left Iverson lying in the snow, and the witness and others carried him to bed unconscious. Heath, one of the victims, stated that the accused beat him and Iverson for about forty-five minutes and then another guard relieved the accused and continued beating them both for thirty minutes. Another PW helped them to their feet and, with the assistance of other PW's, he and Iverson marched in a parade. It is believed that Heath's testimony has greater probative value than Nevill's since Heath was on the spot and was in a better position to know what happened than Nevill. There is nothing in Heath's statement to establish whether the mortal blow or blows (if they were mortal) were inflicted by the accused, or by the guard that relieved the accused, or by both. In the absence of such testimony any determination as to which of the two may have caused the death (if they did) is speculative and conjectural and the evidence is insufficient to support the finding that the accused contributed to the death. Since Heath states both he and Iverson were able to march in a parade after the beating, he raises a reasonable doubt as to whether either of the perpetrators inflicted blows upon Iverson that were in fact mortal. Major Kostecki, the medical officer, who saw Iverson just before the latter died, does not state the cause of his death; he does state that Iverson had previously shown evidence of starvation and malnutrition. PW Bull stated Iverson had died of pneumonia. The entry on the death certificate that shows beriberi as the cause of Iverson's death has no probative value because the certificate was signed by Major Kostecki without knowledge of its contents and under duress. Thus there is no convincing evidence to show the causal connection between the acts of the accused and the death of Iverson. The finding that the accused contributed to the death of Iverson has not been established beyond a reasonable doubt, and the finding in that regard should be disapproved. However, there is compelling evidence that the accused did commit an aggravated assault upon both Iverson and Heath.

(2) Specification 2: PW Cherne states he was one of four PW's beaten by the accused with a bamboo pole for about forty-five minutes during the dinner hour. He states that after the beating all rejoined the group of PW's; he ate lunch, and all went back to work. After work apparently all marched back to camp about six miles. Although he does not mention the Dutchman as being one of the four that the accused had beaten, he stated that three of them were able to get out of bed on the second day, but the Dutchman stayed in bed, was moved to the hospital, and died there in a couple of days, apparently from the beating he had received. It is clear that Cherne meant the Dutchman was one of the four men beaten. PW French corroborates Cherne's testimony that the Dutchman marched several miles to camp through snow a foot deep. PW's Mayo and French state the Dutchman was beaten into unconsciousness, but Cherne, one of the victims of the beating, does not indicate that any of the four were beaten into unconsciousness. PW Mayo states that the beatings were inflicted by the accused and another. Thus it has not been established

beyond a reasonable doubt whether the mortal blow or blows (if they were mortal) were inflicted upon the unidentified Dutch PW by the accused, or by the other guard, or by both, and whether the inflicted blows were in fact mortal. There is no convincing evidence to show the causal connection between the acts of the accused and the death of the unidentified Dutch PW. The finding that the accused contributed to the death of the Dutch PW has not been supported, and the finding in that regard should be disapproved. The evidence is not sufficient to support the finding that the accused mistreated American PW's other than Cherne and Ackerman. However, there is sufficient competent evidence to support a finding that the accused committed an aggravated assault upon Cherne, Ackerman and an unidentified Dutch PW.

(3) Specifications 3, 4, 5: The evidence is legally sufficient to support the findings as to these specifications.

(4) Specification 6: The evidence is legally sufficient to support only so much of the findings of this specification as provides that the accused did willfully and unlawfully mistreat numerous American and Allied prisoners of war, in instances other than those alleged in Specifications 1 to 5 inclusive, by beating and otherwise abusing them.

The record is legally sufficient to support the charge. The Commission was constituted by proper authority and had jurisdiction of the accused and of the offenses alleged. There are no irregularities which injuriously affect any substantial rights of the accused.

b. The defense contended that some of the affiants in referring by nickname to the Japanese who inflicted the beatings, did not identify the nickname with the accused. The identity of the accused was clearly established by the affiants by nickname and photographs (Ex. 11, 12 (Krysan); 17, 18, 21 (Condit); 19, 20 (Heath); 22; 24); by nicknames and proper name (Ex. 2, 3, 4, 14); by nicknames only (Ex. 5, 8, 10, 13, 15, 16, 23, 25); by proper name only (Ex. 1, 6, 7, 9). The identity of the accused was further established by the incidents and the description of the accused contained in the affidavits.

c. The defense contended that in the reply to the United States Secretary of State made through the Swiss Minister, 4 February 1942, to wit:

"Although not bound by the Convention relative treatment of prisoners of war, Japan will apply mutatis mutandis provisions of that Convention to American prisoners of war in its power",

it was not expected that the Japanese Government would strictly observe the provision of the Geneva Convention against corporal punishment, since it was in direct conflict with the practice of the Japanese Army and the culture and traditions of the Japanese people. (Defense Motion, p. 10). This contention is without merit, as no such reservation is contained in the reply either expressed or implied. The phrase, "mutatis mutandis", means "with the necessary changes in points of detail". (underscoring supplied) (Black's Law Dictionary). As applied to the Geneva Prisoner of War Convention, it meant that Japan agreed to abide by the provisions of that Convention except for such changes in details as were necessary to make the provisions effective. The preamble of the Convention recognizes that "...in the extreme case of war it will be the duty of every Power to diminish, so far as possible, the unavoidable rigors thereof and to mitigate the fate of prisoners of war. . ." Article 2 declares that prisoners of war "are in the power of the hostile Power, but not the individual or corps who have captured them" and that they must at all times "be humanely treated and protected, particularly against acts of violence, insults, and public curiosity". Article 46 declares that "any corporal punishment, . . . and, in general, any form of cruelty, is forbidden". These provisions prescribe very definite policies in regard to the treatment of prisoners of war, and are binding upon all contracting powers and other powers that have adhered to or agreed to apply the provisions of the Convention. The Japanese Government is

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thus bound by the spirit of the provisions as set forth in the Convention. It may not by agreeing to apply them "*mutatis mutandis*" alter or abrogate the provisions. Were it permitted to do so, its declared intention to apply them, would amount to a nullity. Whether corporal punishment was practiced in the Japanese Army upon Japanese personnel is beside the point. As to its own personnel Japan had power to administer in such matters, but the defense may not plead the practice in the Japanese Army as a justification for practicing corporal punishment on prisoners of war. "If a government could set up its own municipal law as the final test of its international rights and obligations, then the rules of international law would be but the shadow of a name, and would afford no protection either to states or to individuals. It has been constantly maintained and also admitted by the Government of the United States that a Government can not appeal to its municipal regulations as an answer to demands for the fulfillment of international duties. This proposition seems now to be so well understood and so generally accepted, that it is not deemed necessary to make citations or to adduce precedents in its support." (Secretary of State Bayard to Comnery, November 1, 1887, U. S. Foreign Relations (1887) p. 753, The Law of Nations; Cases, Documents and Notes, Briggs, p. 53). In binding itself by the provisions of the Convention, the Japanese Government was under an obligation to enact whatever legislation was necessary to implement the provisions of the Convention prohibiting corporal punishment upon prisoners of war. ". . . a State is under a duty to enact whatever legislation may be necessary to insure the execution of its treaty obligations, and, consequently, . . . it may not plead the lack of such legislation as a justification for its failure to perform those obligations . . . The Permanent Court of International Justice in its opinion in the Case relative to the Exchange of Greek and Turkish populations (1925) declared it to be a 'self-evident' principle that 'a State which has contracted valid international obligations is bound to make in its legislation such modifications as may be necessary to insure the fulfillment of the obligations undertaken.'" (Publications of the P.C.I.J., Series B; No. 10, p. 20, The Law of Nations, Cases, Documents and Notes, Briggs, p. 434).

d. The defense further contended in its motion that the first and third provisions of Article 46, Geneva Convention were in conflict. They read as follows:

- "1. Punishments other than those provided for the same acts for soldiers of the national armies may not be imposed upon prisoners of war by the military authorities and courts of the detaining Power.
3. Any corporal punishment, any imprisonment in quarters without daylight and, in general, any form of cruelty, is forbidden."

The defense insisted that by implication and reasonable construction the first provision authorizes the imposition upon prisoners of war such punishments as might be imposed upon soldiers of the Japanese Army; that since corporal punishment was the usual punishment imposed for minor offenses in the Japanese Army, the first provision would seem to justify similar punishments for like offenses when committed by prisoners of war; and that in agreeing to apply the provisions, "*mutatis mutandis*", Japan was authorized to determine which of the two conflicting provisions of Article 46 would be followed. This contention is likewise without merit as the punishments provided in the first provision of Article 46 are limited by the third provision of that article which prohibits any corporal punishment. Thus punishments provided in the Japanese Army may be imposed upon prisoners only if those punishments do not violate the third provision. The first and third provisions of the Article are not in conflict, the latter being merely a limitation on the former.

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e. The defense contended the Commission erred in overruling the defense motion for a finding of not guilty on Specifications 1 and 2 at the close of the evidence for the prosecution (R. 21, 22, and Defense Motion, p. 15) on the grounds that the prosecution failed to show the causal connection between the acts of the accused and the deaths of Ivarson and the Dutch prisoner of war. The Commission properly overruled this defense motion. The prosecution introduced ample evidence to support a charge of aggravated assault, by the accused on Ivarson and the Dutch prisoner of war, a lesser included offense of Specifications 1 and 2 (Manual for Courts-Martial, 1928, par. 71d).

f. The prosecution introduced its evidence by means of numerous affidavits of former prisoners of war, American, British, Dutch, who were interned in the camp at the time of the alleged offenses and were in a position to know the facts of the matters in issue. From these, the testimony of defense witnesses, and the admissions of the accused, the guilt of the accused to the extent advised herein has been clearly established.

g. The accused was ably represented by counsel, both Japanese and American, and cooperated fully in his defense. He was given adequate opportunity to present any matters he desired in his own defense. He took the stand in his own behalf and produced witnesses in his own defense.

h. The question of sanity of the accused, although not raised by the defense at any time during the trial, was raised by the defense in a supplemental defense motion for a modification of the findings and sentence. The defense contended that the evidence does not show beyond a reasonable doubt that the accused was sane at the time he is alleged to have committed the offenses charged against him. The defense cited the evidence contained in prosecution exhibits 6, 16, 23, 25, 9, included in the evidence above in support of Specification 6 and in the supplemental defense motion. These five affiants testified in effect as indicated by the prosecution in its opening statement concerning the accused:

"He so mistreated prisoners of war that he was thought to be demented. Numerous affidavits will state that the prisoners of war thought him to be off his mind." (R. 3).

"He had very strong sadistic tendencies, and I think he was a little unbalanced" (Ex. 6). "He was apparently deranged. . . and beat innumerable prisoners" (Ex. 16). "He beat the American soldier. . . and appeared to be crazy" (Ex. 23). "He received a combat head injury. . . There were times he did not seem to be himself and during those times he treated the prisoners very badly. . . I considered him mean and ornery rather than vicious or really brutal" (Ex. 25). "There were many beatings by the accused who was mentally deranged. . . he lacked all vestige of control" (Ex. 9). It will be observed that the first four affidavits (Ex. 6, 16, 23, 25) are by laymen who were not qualified to express an expert opinion. The fifth affidavit (Ex. 9) of Jan Frederic de Wijn, Netherlands Army, shows only that the affiant was a doctor. There is nothing in his affidavit to show what qualifications he possessed or that he had any training or skill in mental diseases, enabling him to give an expert opinion. "If his physician's opinion is based on observation, and he has no special skill fitting him to give such opinion, he is in the same position as any intelligent person who has had the same facilities for observation, and is not an expert." (McKelvey on Evidence, Third Edition, p. 292. Underscoring supplied). It thus appears that none of the five affiants was qualified to state whether the accused had any defect or disease of the mind.

All men are presumed to be sane until the contrary appears, and the defendant who sets up the plea of insanity must introduce evidence to rebut the presumption (Clark, Criminal Law, Third Edition, p. 74). The defense is not required to establish the insanity beyond a reasonable doubt, but it must introduce evidence sufficiently persuasive to impair the presumption of sanity. Although little is required to raise the issue of insanity, the evidence on such issue must disclose more than a mere doubt to overthrow the existing presumption (Approved opinion of the Judge Advocate General in U.S. v. Barbera 46 BR 212). "If insanity is relied on and evidence given tending to establish that unfortunate condition of mind, and a reasonable well-founded doubt is thereby raised of the sanity of the accused, every principle of justice and humanity demands that the accused shall have the benefit of the doubt". (Davis v. U.S. 160, U.S. 469. Underscoring supplied). In the instant case it is not believed the evidence cited by the defense establishes the required reasonable, well-founded doubt.

Insanity, in its legal sense, is any defect or disease of the mind which renders a person incapable of entertaining criminal intent. (Clark, Criminal Law, Third Edition, p. 64). The actions of the accused do not indicate he was suffering from any mental disease, defect, or derangement which made it impossible for him to distinguish between right and wrong when inflicting the beatings, or knowing that they were wrong, which made it impossible for him to desist from inflicting them. His actions indicate moral perversion and passion. "The expression 'moral insanity' is often used, but strictly speaking, it is not insanity at all. It is merely a perverted or abnormal condition of the moral system, where the mind is sound. It is well settled that there is no exemption from responsibility merely because of moral insanity, or because of ungovernable passion, sometimes called 'emotional insanity'" (Clark and Marshall, Crimes, 4th Edition, par. 87). The five affiants in referring to the accused as "unbalanced", "deranged", or "crazy" were using these terms not in the technical sense employed by psychiatrists but in the colloquial sense regularly used by laymen. These affiants at most intended to attribute to the accused only moral or emotional insanity arising from a moral depravity or callous nature. Such moral degeneration, emotional insanity, or temporary frenzy or passion arising from excitement or anger do not excuse the accused from criminal responsibility.

The accused elected to testify. The Commission had ample opportunity to observe his demeanor while on the stand. On being asked the extent of his injuries received in the service, he stated he was unable to use his right arm. Nowhere did he state that he had received any head injury, as one affiant had apparently erroneously stated (Ex. 25), which could have affected his mind. He admitted he had beaten prisoners on various occasions, and he described five incidents clearly. There was nothing in his testimony that indicated a diseased mind; nor did any of the defense witnesses relate any incidents of insane conduct on the accused's part. Had the accused been suffering from any mental disease at the time of the alleged offenses, this matter would certainly have been brought out by the defense while the witnesses were on the stand. The tenor of the petitions of clemency, signed by hundreds of villagers who had known the accused since childhood, indicated that the accused had a keen mind, a strong sense of responsibility, and that he always acted deliberately in everything.

All the evidence discloses the accused was a perfectly normal individual in every respect except for the misconduct of which he stood convicted. "The common man does not readily believe that occasional and impulsive misconduct of a particular character by one who, in every other respect, demonstrates sane conduct and ordinary behavior, springs from such defect, disease or derangement of the mind as hopelessly deprives him of the will to refrain from doing what he knows is wrong, and in this he has the respectable company of many medical and juridical authorities. . ." (Approved opinion of the Judge Advocate General in U.S. v. Barbera, 46 BR 217). In the complete absence of any expert opinion to establish a diseased mind, the only reasonable and logical conclusion to be reached in the instant case, considering the entire conduct of the accused, is that he was sane. "Moreover members of military courts, as well as juries in civil life, bring into their deliberations their own common sense founded upon knowledge of the everyday behavior and experiences of men in the routine affairs

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of life, and they are not only entitled to use this knowledge in weighing the evidence but are specifically charged to do so." "To command respect criminal law must not offend against the common belief that men who talk rationally are in most cases morally responsible for what they do." (Approved opinion of the Judge Advocate General in U.S. v. Barbera, 46 BR 217). The Commission was satisfied beyond a reasonable doubt that the accused was sane at the time he is alleged to have committed the offenses charged against him. Their findings and sentence should not be set aside on the ground of insanity.

i. Other contentions raised by the defense in its motions for modification of the findings and sentence have been previously discussed in several reviews. The objections raised in the motions have been held to be either not erroneous or not of sufficient consequence to prejudice the rights of the accused. They have not been discussed again herein.

6. Recommendations:

a. The insufficiently supported findings of contributing to the death contained in Specifications 1 and 2 should be disapproved. The evidence is not sufficient to support the findings in Specification 2, that the accused mistreated American PWs other than Cherne and Ackerman, and that part of the findings referring to other unidentified American Prisoners of War should be disapproved. Only so much of the findings of Specification 6 as provides that the accused did willfully and unlawfully mistreat numerous American and Allied prisoners of war, in instances other than those alleged in Specifications 1 to 5 inclusive, by beating and otherwise abusing them, should be approved.

b. Clemency was not recommended by the Commission. The defense filed two motions for modification of the findings and sentence. Several petitions for clemency signed by relatives and friends of the accused were thoroughly examined. In general they emphasize the devotion of the accused to the prisoners of war intrusted to his care and his self-sacrifice in safeguarding their welfare even to the extent of being branded as unpatriotic by his own people. They point out the excellent reputation enjoyed by the accused in his local community prior to the war. Notwithstanding the assertions contained in the petitions, the evidence from prisoners of war of three different nationalities, American, British and Dutch, who were present in the camp and suffered the tortures inflicted upon them by the accused is so compelling as to clearly establish the guilt of the accused to the extent advised. For the commission of these offenses, justice demands that the accused should be adequately punished.

c. For the offenses for which he is to be sentenced, a period of confinement at hard labor for twenty-five years would be justified, and is recommended. In accordance with the established policy, owing to the length of time the accused spent in confinement prior to date of sentence, it is recommended that ten months of the sentence be remitted.

d. It is recommended that except to the extent advised herein, in all other respects the two motions of the defense for a modification of the findings and sentence be denied.

7. Action:

Attached hereto is a form of action designed to carry into effect the above recommendations.

F. R. UNDRITZ
Lt. Col. Inf.
Asst. Staff Judge Advocate

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I concur with the conclusions in the foregoing review, except where the following statements indicate a different view. A general statement as to the philosophy and law pertaining to War Crimes trials is appropriate here.

Strict pleading is not a requisite in War Crimes trials. It is enough if the charges are sufficiently clear so that a reasonable person can comprehend their essence and prepare a defense, and so that adjudication will bar future prosecution for the same offenses. A charge or a finding of "contributing to death", though inartificial is plainly intended to charge or find when considered with the evidence presented that the acts referred to, proximately and directly contributed to the death. Where it is determined that the accused was guilty of contributing to death, it is considered that the essential proof which supported the charge was available to the accused before the trial so that he was cognizant of the fact that he was being charged with directly and proximately contributing to a death and therefore was not misled as to the offenses charged. It is apparent that asserting that one has directly and proximately contributed to a homicide produces the same legal result as alleging that he has directly and proximately caused the death. War crimes concepts are not concerned with over-legalistic niceties, but only with what will afford the "fair protection that civilized nations provide for those accused of crimes" (26, Amer. Jurisprudence, p. 121, Homicide, Sec. 48, 49).

Careful examination of the facts in evidence compels a view that certain deaths, as alleged, were directly and proximately caused by the mistreatment, etc., as pleaded and as herein discussed. In considering the proof the law does not restrict itself to such refinements of proof as would make the proper accomplishment of justice impossible. It does not throw away its own common sense. It retains and uses the knowledge that ordinary reasonable persons have. It utilizes the common experience of mankind. In cases in which a death occurs from a cause which cannot be determined by use of the above reasonable tests of common experience and common knowledge of mankind, expert testimony to aid the court is customarily required; otherwise it is not. "Where the facts are such that they can be placed before and understood by the jury, and where they are such matters of common observation and experience that the jurors are just as competent to draw inferences therefrom as the witness there is no necessity of either an ordinary or skilled witness" (23, C.J.S., Sec. 853, pp. 64, 67, citing cases from 41 States).

In considering responsibility for a death it is not necessary to find a conspiracy in order to hold each of two or more accused; if they were accessories, hence principals, aiding each other in accomplishing the death, each may be held. "If, at the moment of death it can be said that both injuries are contributing thereto the responsibility rests on both actors. In such cases the law does not measure the effect of the several injuries in order to determine which is the more serious, and which contributes in greater measure to bring about the death. So, one of two persons who caused the death of another by shooting is guilty of homicide if the wound inflicted by him contributes or hastens the death, although it might not be fatal" (26, Amer. Jurisprudence, p. 122, Homicide, Sec. 48). If both the act charged and disease directly and proximately contribute to cause of death the person who performs the illegal act may be held for the homicide (26, Amer. Jurisprudence, p. 125, Homicide, Sec. 52).

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In fact, where one inflicts a fatal injury and another thereafter inflicts an injury which accelerates death it is held "that the person who inflicts the first injury may be convicted if it appears that the injury or wound inflicted by him would have caused the death if there had been no intervening act of another. In other words if, after one inflicts mortal injuries, another, while the injured person is still living, inflicts, by a villainous act, injuries which in fact cause death, both assailants may properly be said to have contributed to his death and may be convicted thereof" (Amer. Jurisprudence, p. 123, Homicide, Sec. 50, and citations thereto. See also Sec. 45).

Specification 1: It is considered that the finding of guilty of this specification should be approved. The evidence, summarized on pp. 2 and 3 of the foregoing review, conclusively establishes beyond a reasonable doubt that the victim, Ivarson, was so brutally beaten and abused by accused that his death was directly and proximately caused thereby. He was struck with a club across the back and legs, knocked from a push-up position to the ground, beaten and kicked for at least 30 minutes and left lying unconscious, his blood staining the snow. He regained consciousness in the morning but lapsed into unconsciousness and died within about 60 hours. Even if the evidence were to be accepted that he walked in a parade with the assistance of others, afterwards being confined to his hut, circumstances herein shown in evidence indicate that the death is chargeable in law to the accused. The responsibility of the latter is not lessened because another guard may have succeeded him in the beating. It is clear that in that event each aided and abetted the other and that a combination of the actions of the two directly resulted in the death. It is noted that after a conference between the accused and a guard who replaced him, the latter took up the beating where the former left off (Ex. 20).

Specification 2: It is believed that the death of the unidentified Dutch prisoner of war is compellingly proved as having been directly and proximately contributed to by the accused, to the extent that the accused is chargeable therewith. The participation by another person in the mistreatment charged in this specification is subject to the same reasoning as that applied under Specification 1. The finding of guilty under this specification should be approved, except as to the words "and other unidentified American Prisoners of War".

Under the facts as compellingly established in this case, it is felt that there is no escape from approving the sentence adjudging the extreme penalty. In judging War Crimes cases, no element of vindictiveness or revenge should be allowed to enter. This outstanding basic consideration is of the greatest importance--is the sentence legal and appropriate under all the facts in evidence, considering the requirement for a fair trial of the accused and the guarantee in the Potsdam Declaration that war criminals would be properly charged with their offenses as a deterrent against future

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War Crimes? Measured by the standards of civilized nations, the war crimes of which this accused was convicted place him in the category of felons for whom the death sentence is expected by people of good conscience everywhere. The callousness, brutality and disregard of human life evidenced by him and the tragic results thereof stamp him as one who should be removed from the fellowship of mankind.

That a fair trial was granted him is evidenced by the following quotation from a clemency petition submitted by his wife: "Relating to the trial of Hajime Honda, I have heard that the proceedings were extremely fair in contrast to Japanese courts and we know no bounds in expressing our appreciation and thanks to members of the court."

Proposed actions to implement the recommendations in the foregoing review, as modified by these addenda, are attached.

ALLAN P. BROWN
Lt. Col. JAGD
Army Judge Advocate

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